

JEFFER, MANGELS, BUTLER & MARMARO LLP
 ROBERT C. GEBHARDT (Bar No. 48965), rcg@jmbm.com
 MICHAEL A. GOLD (Bar No. 90667), mag@jmbm.com
 MATTHEW S. KENEFICK (Bar No. 227298), msk@jmbm.com
 Two Embarcadero Center, Fifth Floor
 San Francisco, California 94111-3824
 Telephone: (415) 398-8080
 Facsimile: (415) 398-5584

Attorneys for Plaintiffs FAMILYMEDS, INC., a Connecticut corporation and FAMILYMEDS GROUP, INC. a Nevada corporation, f/k/a DRUGMAX, INC., a Nevada corporation

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

FAMILYMEDS, INC., a Connecticut corporation; and FAMILYMEDS GROUP, INC. a Nevada corporation, f/k/a DRUGMAX, INC., a Nevada corporation,

Plaintiffs,

v.

MCKESSON CORPORATION, a Delaware corporation; and D&K HEALTHCARE RESOURCES LLC, a Delaware limited liability company, f/k/a D&K HEALTHCARE RESOURCES, INC., a Delaware corporation,

Defendants.

CASE NO. CV082850 BZ
 RELATED CASE NO. CV075715 WDB

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF ADMINISTRATIVE MOTION TO CONSIDER WHETHER CASES SHOULD BE RELATED [Local Rule 3-12(b)]

Accompanying Papers: Motion; Kenefick Declaration; and (Proposed) Order

Complaint filed: June 6, 2008
 Trial date: none set

Pursuant to Federal Rule of Evidence 201, Plaintiffs Familymeds, Inc., a Connecticut corporation and Familymeds Group, Inc. a Nevada corporation, f/k/a DrugMax, Inc., a Nevada corporation (collectively, "**Plaintiffs**") hereby submit the following Request for Judicial Notice in Support of Administrative Motion to Consider Whether Cases Should be Related:

1. Plaintiffs hereby request the Court take judicial notice of the Complaint for Breach of Contract filed by McKesson Corporation in the above-referenced Court on November 9, 2007, in

JMBM
 Jeffer Mangels
 Butler & Marmaro LLP

1 matter of *McKesson Corporation v. Familymeds Group etc.*, Northern District of California Case
2 Number CV075715 WDB (the "**First Action**"), a true and correct copy of which is attached hereto
3 as **Exhibit 1**.

4 2. Plaintiffs hereby request this Court take judicial notice of the Counterclaim for
5 Specific Performance of Contract and Accounting; Cross-Complaint for Accounting filed in the
6 First Action, a true and correct copy of which is attached hereto as **Exhibit 2**.

7 3. Plaintiffs hereby request this Court take judicial notice of the Motion to Dismiss: (1)
8 Counterclaim for Specific Performance of Contract and Accounting; and (2) Cross-Complaint for
9 Accounting filed on January 14, 2008, in the First Action, a true and correct copy of which is
10 attached hereto as **Exhibit 3**.

11 4. Plaintiffs hereby request this Court take judicial notice of its Order Re May 5, 2008
12 Case Management Conference, a true and correct copy of which is attached hereto as **Exhibit 4**.

13 5. Plaintiffs hereby request this Court take judicial notice of Plaintiffs' Complaint for
14 Specific Performance of Contract and Accounting, filed in the above-referenced Court on June 6,
15 2008, in Case Number CV082850 BZ, a true and correct copy of which is attached hereto as
16 **Exhibit 5**.

17
18 DATED: June 16, 2008

JEFFER, MANGELS, BUTLER & MARMARO LLP
ROBERT C. GEBHARDT
MICHAEL A. GOLD
MATTHEW S. KENEFICK

19
20
21 By: /S/ Robert C. Gebhardt

ROBERT C. GEBHARDT
Attorneys for Plaintiffs FAMILYMEDS, INC., a
Connecticut corporation; and FAMILYMEDS
GROUP, INC. a Nevada corporation, f/k/a
DRUGMAX, INC., a Nevada corporation

JMBM
Jeffer Mangels
Butler & Marmaro LLP

EXHIBIT 1

MARIA K. PUM (State Bar No. 120987)
 KRISTEN E. CAVERLY (State Bar No. 175070)
 HENDERSON & CAVERLY LLP
 P.O. Box 9144 (all U.S. Mail)
 16236 San Dieguito Road, Suite 4-13
 Rancho Santa Fe, CA 92067-9144
 Telephone: (858) 756-6342
 Facsimile: (858) 756-4732

Attorneys for Plaintiff
 McKESSON CORPORATION

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

McKESSON CORPORATION, a Delaware
 corporation,

Plaintiff,

v.

FAMILYMEDS GROUP, INC.,
 f/k/a Drugmax, Inc., a Connecticut corporation,

Defendant.

CV 07

5715

**COMPLAINT FOR BREACH OF
 CONTRACT**

(Diversity Jurisdiction: 28 U.S.C. § 1332)

DEMAND FOR JURY TRIAL

Plaintiff, McKESSON CORPORATION ("Plaintiff") alleges as follows:

THE PARTIES

1. Plaintiff is a Delaware corporation with its principal place of business at One Post Street, San Francisco, CA 94104.
2. Plaintiff is informed and believes, and thereon alleges, that defendant FAMILYMEDS GROUP, INC. f/k/a Drugmax, Inc. ("Familymeds") is a Connecticut corporation with its principal place of business at 312 Farmington Avenue, Farmington, CT 06032.

VENUE AND JURISDICTION

3. Venue properly lies in this district pursuant to 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.
4. Pursuant to 28 U.S.C. § 1332, this Court has jurisdiction in this matter.

EXHIBIT 1

COPY

Complaint

GENERAL ALLEGATIONS

5. Plaintiff is in the business of distributing pharmaceutical products manufactured by others to retailers and others.

6. Defendants are in the business of operating pharmacies and selling pharmaceutical and other products to consumers and other persons and entities. Familymeds was formed by the merger on November 12, 2004, of DrugMax, Inc., and Familymeds Group, Inc.

7. On February 2, 2007, Familymeds and Plaintiff entered into a contract entitled "Supply Agreement" (the "Agreement") for fair and valuable consideration, pursuant to which Plaintiff agreed to sell to Familymeds and Familymeds agreed to buy from Plaintiff certain "Merchandise" described therein.

8. The Agreement provides that it lasts for a term of three years commencing on December 28, 2006. The Agreement currently remains in full force and effect.

9. The Agreement provides:

Customer agrees to render payment in full to McKesson on the applicable due date as specified in this Agreement without (i) making any deductions, short payments, or other accounts payable adjustments to such payment obligation; or (ii) seeking to condition such remittance on any demand for or receipt of proofs of delivery. Any accounts payable adjustments claimed by Customer shall require prior written authorization of McKesson and must be supported by accompanying detail documenting the basis for any such requested adjustments.

10. Pursuant to the Agreement, Familymeds has purchased Merchandise from Plaintiff for which Familymeds is obligated to pay Plaintiff in accordance with pricing terms contained in the Agreement.

11. Familymeds has failed to pay for Merchandise sold and/or delivered to Familymeds by Plaintiff pursuant to the Agreement. The amount owing by Familymeds to Plaintiff is now past due.

12. The Agreement also provides:

Any payments made after the due date indicated herein shall result in a two percent (2%) (or the maximum amount permissible under applicable law, if lower) increase in the purchase price of the Merchandise. A one percent (1%) service charge (or the maximum amount permissible under applicable

1 law, if lower) will be imposed semi-monthly on all balances delinquent
2 more than fifteen (15) days.

3 Thus, if Familymeds fails to make payment timely, the purchase price for the Merchandise for
4 which payment has not been timely received increases by 2 percent or the maximum amount
5 permissible by law, if lower (in either case, referred to herein as the "2% Price Increase").

6 Additionally, all balances delinquent more than 15 days result in Familymeds incurring a 1 percent
7 service charge (or the maximum amount permissible under applicable law, if lower) imposed
8 semimonthly on such delinquent balance (in either case, referred to herein as the "1% Service
9 Charge").

10 13. In addition to the 2% Price Increase and the 1% Service Charge, the Agreement
11 provides the price that Familymeds must pay to Plaintiff for Merchandise increases as the volume
12 of purchases decreases, and vice versa, across several levels of purchase volumes. This adjustment
13 to the price that Familymeds must pay for Merchandise purchased from Plaintiff based on the
14 volume purchased is referred to herein as the "Volume Price Adjustment."

15 14. After executing the Agreement, Familymeds failed to purchase a sufficient volume
16 of Merchandise to qualify for the lowest price level specified in the Agreement. Notwithstanding
17 that fact, to the extent Familymeds paid for Merchandise, it paid at the lowest pricing level
18 specified in the Agreement even though it was not entitled to do so.

19 15. As of October 31, 2007, the past due amount owing by Familymeds to Plaintiff on
20 account of Merchandise sold to Familymeds pursuant to the Agreement aggregated at least
21 \$724,574.80 (the "Past Due Amount"), which calculation takes into account the 2% Price Increase
22 and the 1% Service Charge through October 31, 2007, but does not take into account the price
23 increase that applies if the Volume Price Adjustment is made due to Familymeds' failure to qualify
24 for the lowest price level specified in the Agreement. Based on the volume of Merchandise
25 purchased by Familymeds in recent months, Familymeds should be paying the highest price set
26 forth in the Agreement. The \$724,574.80 figure is calculated without applying the Volume Price
27 Adjustment to which Plaintiff is entitled.

1 the Agreement after the Volume Price Adjustment is properly applied to the purchases made by
2 Familymeds from Plaintiff pursuant to the Agreement.

3 **PRAYER**

4 WHEREFORE, Plaintiff prays for relief as follows:

5 27. For monetary damages of at least \$724,574.80, plus the 1% service Charge from and
6 after October 31, 2007;

7 28. For additional monetary damages in an amount to be demonstrated by proof based
8 on Familymeds' having paid the incorrect purchase price for Merchandise due to its failure to
9 properly apply the Volume Price Adjustment to the Merchandise purchased from Plaintiff since
10 execution of the Agreement;

11 29. For interest as may be allowed by law;

12 30. For costs, including reasonable attorneys' fees; and,

13 31. For such other and further relief as the Court deems proper.

14 DATED: November 8, 2007.

HENDERSON & CAVERLY LLP

15
16
17 By: 

Maria K. Purn

Attorneys for McKesson Corporation

18
19 **DEMAND FOR JURY TRIAL**

20
21 Plaintiff hereby demands trial by jury on all claims for which such right attaches.

22
23 DATED: November 8, 2007.

HENDERSON & CAVERLY LLP

24
25 By: 

Maria K. Purn

Attorneys for McKesson Corporation

EXHIBIT 2

JEFFER, MANGELS, BUTLER & MARMARO LLP
 ROBERT C. GEBHARDT (Bar No. 48965), rcg@jmbm.com
 MICHAEL A. GOLD (Bar No. 90667), mag@jmbm.com
 MATTHEW S. KENEFICK (Bar No. 227298), msk@jmbm.com
 Two Embarcadero Center, Fifth Floor
 San Francisco, California 94111-3824
 Telephone: (415) 398-8080
 Facsimile: (415) 398-5584

Attorneys for Defendant and Counterclaimant FAMILYMEDS
 GROUP, INC., f/k/a DRUGMAX, INC., a Connecticut corporation
 and Cross-Complainant FAMILYMEDS, INC., a Connecticut
 corporation

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MCKESSON CORPORATION, a Delaware
 corporation,

Plaintiff,

v.

FAMILYMEDS GROUP, INC., f/k/a
 DRUGMAX, INC., a Connecticut corporation,

Defendant.

FAMILYMEDS GROUP, INC., f/k/a
 DRUGMAX, INC., a Connecticut corporation,

Counterclaimant,

v.

MCKESSON CORPORATION, a Delaware
 corporation,

Counterdefendant.

FAMILYMEDS, INC., a Connecticut
 corporation,

Cross-Complainant,

v.

MCKESSON CORPORATION, a Delaware
 corporation,

Cross-Defendant.

CASE NO. CV075715 WDB

**COUNTERCLAIM FOR SPECIFIC
 PERFORMANCE OF CONTRACT AND
 ACCOUNTING; CROSS-COMPLAINT FOR
 ACCOUNTING**

DEMAND FOR JURY TRIAL

Complaint filed: November 9, 2007

JMBM
 Jeffer Mangels
 Butler & Marmaro LLP

1 Defendant and Counterclaimant Familymeds Group, Inc., f/k/a Drugmax, Inc., a
2 Connecticut corporation ("Familymeds Group") and Cross-Complainant Familymeds, Inc., a
3 Connecticut corporation ("Familymeds"), hereby each respectively complain against McKesson
4 Corporation, a Delaware corporation, ("McKesson"), as follows:

5 **GENERAL ALLEGATIONS**

6 **JURISDICTION**

- 7 1. This Court has diversity jurisdiction pursuant 28 U.S.C. § 1332.
- 8 2. Familymeds Group is a Connecticut corporation with its principal place of business
9 at 2 Bridgewater Road, Farmington, Connecticut 06032.
- 10 3. Familymeds is a Connecticut corporation with its principal place of business at 2
11 Bridgewater Road, Farmington, Connecticut 06032.
- 12 4. Familymeds is the wholly-owned subsidiary of Familymeds Group.
- 13 5. Familymeds Group and Familymeds are informed and believe, and on that basis
14 allege that at all times herein mentioned, McKesson is a Delaware corporation with its principal
15 place of business at One Post Street, San Francisco, California 94104.
- 16 6. Familymeds Group and Familymeds are informed and believe, and on that basis
17 allege that McKesson became the successor-in-interest to D&K Healthcare Resources, Inc.
18 ("D&K") in 2005.
- 19 7. Familymeds Group is the successor-by-merger to DrugMax, Inc. ("DrugMax").
- 20 8. The amount in controversy under the respective claims of Familymeds and
21 Familymeds Group each exceed the sum or value of \$75,000.

22 **VENUE**

- 23 9. All actions complained of herein took place within the jurisdiction of the United
24 States District Court, Northern District of California. Accordingly, venue is invoked pursuant to 28
25 U.S.C. § 1391(a).

26 **INTRADISTRICT ASSIGNMENT**

- 27 10. A substantial part of the events or omissions giving rise to the claims for relief set
28 forth herein occurred in the City and County of San Francisco.

JMBM
Jeffer Mangels
Butler & Marmaro LLP

FACTUAL BACKGROUND

11. On or about December 28, 2004, Familymeds, Valley Drug Company South, a Louisiana corporation ("Valley Drug"), and D&K entered into that certain written Prime Warehouse Supplier Agreement (the "First Agreement") for fair and valuable consideration, which provided, *inter alia*, for D&K to sell and Familymeds and Valley Drug to buy certain "Products" (as that term is defined therein).

12. The First Agreement provided for a term of two (2) years, commencing on December 28, 2004.

13. On or about December 27, 2005, DrugMax, Familymeds, and D&K entered in that certain written First Amendment to Prime Warehouse Supplier Agreement for fair and valuable consideration, which provided, *inter alia*, to amend certain terms of the First Agreement.

14. On or about February 2, 2007, Familymeds Group and McKesson entered into that certain written Supply Agreement (the "Second Agreement") for fair and valuable consideration, which provided, *inter alia*, for McKesson to sell and Familymeds Group to buy certain "Merchandise" and "Products" (as those terms are defined therein).

15. The Second Agreement provided for a term of three (3) years commencing on December 28, 2007.

16. In or about September 2007, McKesson made demand upon Familymeds Group for certain amounts allegedly due and owing under the Second Agreement without providing sufficient documentation to enable Familymeds Group to ascertain the validity of said demand.

17. On or about September 18, 2007, Familymeds Group requested from McKesson documentation pertaining to prior account statements, charges, credits, pricing adjustments, and payments made under the Second Agreement, as well as documentation supporting the amounts McKesson claimed were due and owing under the Second Agreement (the "Documentation") (the "Request").

18. The Documentation Familymeds Group sought in its Request is within the exclusive possession and control of McKesson.

19. McKesson wrongfully refused and wholly denied the Request.

JMBM
Jeffer Mangels
Butler & Marmaro LLP

1 in accordance with the terms of the Second Agreement by providing the Documentation as required
2 by the Accounting Obligation.

3 30. Familymeds Group has no adequate legal remedy.

4 WHEREFORE, Familymeds Group prays for judgment as set forth herein.

5 **SECOND CLAIM FOR RELIEF**
6 Familymeds Group against McKesson
(Accounting)

7 31. Familymeds Group incorporates by reference the allegations contained in Paragraphs
8 1 through 20 above.

9 32. A relationship exists between Familymeds Group and McKesson, and circumstances
10 require, that McKesson provide to Familymeds Group an accounting in equity.

11 33. An unknown balance is due from McKesson to Familymeds Group for unissued and
12 improperly withheld credits and overcharges which cannot be ascertained without an accounting,
13 the means of which are in the exclusive knowledge and control of McKesson.

14 34. McKesson has the obligation and the ability to account to Familymeds Group.

15 35. No adequate remedy is available to Familymeds Group at law and thus an accounting
16 is necessary to preserve Familymeds Group's rights.

17 WHEREFORE, Familymeds Group prays for judgment as set forth herein.

18 **THIRD CLAIM FOR RELIEF**
19 Familymeds against McKesson
20 (Accounting)

21 36. Familymeds incorporates by reference the allegations contained in Paragraphs 1
22 through 20 above.

23 37. A relationship exists between Familymeds and McKesson, and circumstances
24 require, that McKesson provide to Familymeds an accounting in equity.

25 38. An unknown balance is due from McKesson to Familymeds for unissued and
26 improperly withheld credits and overcharges which cannot be ascertained without an accounting,
27 the means of which are in the exclusive knowledge and control of McKesson.

28 39. McKesson has the obligation and the ability to account to Familymeds.

JMBM Jeffer Mangels
Butler & Marmaro LLP

40. No adequate remedy is available to Familymeds at law and thus an accounting is necessary to preserve Familymeds' rights.

WHEREFORE, Familymeds prays for judgment as set forth herein.

PRAYER FOR RELIEF

WHEREFORE, Familymeds Group and Familymeds each pray for judgment against McKesson as follows:

On The First Claim For Relief:

1. For specific enforcement of the Second Agreement compelling McKesson to comply with its Accounting Obligation;

2. For costs of suit herein incurred; and

3. For such other and further relief as the Court may deem proper.

On the Second Claim For Relief:

1. For an order compelling McKesson to provide to Familymeds Group an accounting in equity;

2. For costs of suit herein incurred; and

3. For such other and further relief as the Court may deem proper.

On the Third Claim For Relief:

1. For an order compelling McKesson to provide to Familymeds an accounting in equity;

2. For costs of suit herein incurred; and

3. For such other and further relief as the Court may deem proper.

DATED: December 17, 2007

JEFFER, MANGELS, BUTLER & MARMARO LLP
ROBERT C. GEBHARDT
MICHAEL A. GOLD
MATTHEW S. KENEFICK

By: /S/ Matthew S. Kenefick

MATTHEW S. KENEFICK
Attorneys for Defendant FAMILYMEDS GROUP,
INC., f/k/a DRUGMAX, INC., a Connecticut
corporation and Cross-Complainant FAMILYMEDS,
INC., a Connecticut corporation

JURY DEMAND

Familymeds Group and Familymeds each demand a jury trial on all issues so triable.

DATED: December 17, 2007

JEFFER, MANGELS, BUTLER & MARMARO LLP
ROBERT C. GEBHARDT
MICHAEL A. GOLD
MATTHEW S. KENEFICK

By: /S/ Matthew S. Kenefick

MATTHEW S. KENEFICK

Attorneys for Defendant FAMILYMEDS GROUP,
INC., f/k/a DRUGMAX, INC., a Connecticut
corporation and Cross-Complainant FAMILYMEDS,
INC., a Connecticut corporation

JMBM Jeffer Mangels
Butler & Marmaro LLP

EXHIBIT 3

MARIA K. PUM (State Bar No. 120987)
KRISTEN E. CAVERLY (State Bar No. 175070)
HENDERSON & CAVERLY LLP
P.O. Box 9144 (all U.S. Mail)
16236 San Dieguito Road, Suite 4-13
Rancho Santa Fe, CA 92067-9144
Telephone: (858) 756-6342
Facsimile: (858) 756-4732
E-mail: mpum@hcesq.com

Attorneys for Plaintiff
McKESSON CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

McKESSON CORPORATION, a Delaware
corporation,

Plaintiff,

v.

FAMILYMEDS GROUP, INC.,
f/k/a Drugmax, Inc., a Connecticut corporation,

Defendant.

FAMILYMEDS GROUP, INC.,
f/k/a Drugmax, Inc., a Connecticut corporation,

Counterclaimant,

v.

McKESSON CORPORATION, a Delaware
corporation,

Counterdefendant.

FAMILYMEDS, INC.,
a Connecticut corporation,

Cross-Complainant,

v.

McKESSON CORPORATION, a Delaware
corporation,

Cross-Defendant.

Case No. 4:07-cv-05715 WDB

**NOTICE OF MOTION, MOTION AND
MEMORANDUM OF POINTS AND
AUTHORITIES OF McKESSON
CORPORATION SEEKING TO
DISMISS:**

**(1) COUNTERCLAIM FOR SPECIFIC
PERFORMANCE OF CONTRACT
AND ACCOUNTING; AND**

**(2) CROSS-COMPLAINT FOR
ACCOUNTING**

Complaint Filed: November 9, 2007
Cross-Complaint Filed: December 17, 2007

Date: March 12, 2008
Time: 3:00 pm
Place: Ctrm 4
1301 Clay St., 3d Floor
Oakland, CA

EXHIBIT 3

Notice of Motion, Motion and Memorandum of Points and Authorities of McKesson Corporation Seeking to Dismiss:
(1) Counterclaim for Specific Performance of Contract and Accounting; and (2) Cross-Complaint for Accounting

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28
- 29
- 30
- 31
- 32
- 33
- 34
- 35
- 36
- 37
- 38
- 39
- 40
- 41
- 42
- 43
- 44
- 45
- 46
- 47
- 48
- 49
- 50
- 51
- 52
- 53
- 54
- 55
- 56
- 57
- 58
- 59
- 60
- 61
- 62
- 63
- 64
- 65
- 66
- 67
- 68
- 69
- 70
- 71
- 72
- 73
- 74
- 75
- 76
- 77
- 78
- 79
- 80
- 81
- 82
- 83
- 84
- 85
- 86
- 87
- 88
- 89
- 90
- 91
- 92
- 93
- 94
- 95
- 96
- 97
- 98
- 99
- 100

MOTION

(3) the Third Claim for Relief in the Cross-Complaint fails to state a claim against McKesson for which relief can be granted such that dismissal thereof is mandated by FRCP 12(b)(6).

MEMORANDUM OF POINTS AND AUTHORITIES**I. STATEMENT OF ISSUES TO BE DECIDED.**

On November 9, 2007, McKesson CORPORATION, a Delaware corporation ("McKesson") filed a complaint (the "Complaint") for breach of contract against a single defendant, FAMILYMEDS GROUP, INC., f/k/a Drugmax, Inc. ("Familymeds Group"). On or about December 17, 2007, McKesson was served not only with an answer to the Complaint, but also with a pleading entitled "Counterclaim for Specific Performance of Contract and Accounting; Cross-Complaint for Accounting" (the "Corss-Complaint"). Pursuant to its motion and this memorandum of points and authorities, McKesson requests that this Court dismiss the Cross-Complaint. The bases for that request are that the Cross-Complaint adds a new party to this action not as a third party defendant under FRCP 14, but rather as a *cross-complainant*. Specifically, the Cross-Complaint is purportedly brought not by Familymeds Group, but by Familymeds, Inc., a Connecticut corporation, which according to the Cross-Complaint is a subsidiary of Familymeds Group. In addition, the Cross-Complaint should be dismissed for the failure to name a necessary party as a third party defendant: D&K Healthcare Resources, Inc. ("D&K"). D&K is a necessary party because the Cross-Complaint purports to seek to enforce contract not mentioned in the Complaint, against McKesson, yet the contract at issue is not a contract to which McKesson is a party. The party to the contract is D&K. Contract parties are necessary parties to an action to enforce the contract. Finally, the Cross-Complaint, or at least the third claim for relief asserted therein, should be dismissed pursuant to FRCP 12(b)(6) for failure to state an claim against McKesson for which relief may be granted.

II. STATEMENT OF FACTS.

The Complaint filed by McKesson against Familymeds Group is a simple breach of contract complaint seeking to collect sums owing for the purchase by Familymeds Group of products from McKesson under the terms of a contract entitled "Supply Agreement" which was dated February 2, 2007 and executed by Familymeds Group and McKesson and no other parties. In response, McKesson received not only an answer from Familymeds Group, but the Cross-

1 Complaint which alleges three claims for relief against McKesson. The trouble is that at least one,
2 possibly more, of those claims for relief are brought by an entirely new entity, Familymeds, Inc.,
3 and appear to be based on an agreement other than the contract that is the subject of the Complaint:
4 a December 28, 2004 contract between Familymeds, Inc., Valley Drug Company and D&K, which
5 is defined in the Cross-Complaint as the "First Agreement." The result is a muddled pleading
6 situation and a fatally defective Cross-Complaint that should be dismissed.

7 III. ARGUMENT.

8 A. Defendant Cannot Add a Third Party Cross-Complainant to the Instant Action.

9 Federal Rule of Civil Procedure ("FRCP") 14 governs the addition of parties to an action by
10 a defendant. As was summarized by the Ninth Circuit in *Stewart v. Am. Int'l Oil & Gas Co.*, 845
11 F.2d 196, 199 (9th Cir. 1988):

12 Fed. R. Civ. P. 14(a) allows a defending party to bring in as third-party
13 *defendant* a person not a party to the action *who is or may be liable to him*
14 *for all or part of plaintiff's claim against him. Thus, a third-party claim may*
be asserted only when the third party's liability is in some way dependent on
the outcome of the main claim and is secondary or derivative thereto.

15 (Emphasis added.). The *Stewart* court continued, quoting Professors Wright and Miller:

16 . . . [the claim] cannot simply be an independent or related claim but *must be*
17 *based upon plaintiff's claim against defendant.* The crucial characteristic of
18 a Rule 14 claim is that defendant is attempting to transfer to the third-party
19 defendant the liability asserted against him by the original plaintiff. The
mere fact that the alleged third-party claim arises from the same transaction
or set of facts as the original claim is not enough.

20 *Id.* at 200 (emphasis added)(*citing* 6 FED. PRAC. & PROC. § 1446 at 257 (1971 ed.)). Because the
21 defendant in *Stewart* failed to meet the requirements of FRCP 14 in bringing a third party
22 complaint, the Ninth Circuit affirmed the District Court's dismissal of the third party complaint.

23 Here, Familymeds Group has not added a third party *defendant* in filing the Cross-
24 Complaint, nor does the Cross-Complaint relate to the facts of the original Complaint. Instead,
25 Familymeds Group has tacked on to the instant case an entirely new action brought by an entirely
26 new entity, Familymeds, Inc., based on an entirely new contract, the so-called "First Agreement."
27 The instant Cross-Complaint does not properly or permissibly add a party pursuant to FRCP 14 to
28

1 this action and is not permitted by FRCP 7¹ or any of the other Federal Rules of Civil Procedure.

2 The Cross-Complaint should be dismissed.

3 **B. Familymeds Group Cannot Assert Claims Against D&K Healthcare Resources**
4 **Inc. Without Naming D&K Healthcare Resources Inc. as a Party.**

5 In addition to the fatal defect relating to the improper application of FRCP 14, the Cross-
6 Complaint is fatally flawed in that it asserts claims against a new entity that is not named as a party
7 in the Cross-Complaint. Specifically, in paragraph 11 of the Cross-Complaint, the Cross-
8 Complaint makes reference to a contract defined as the "First Agreement" which is described as an
9 agreement entered into on December 28, 2004 by and among Familymeds, Inc., Valley Drug
10 Company and D&K Healthcare Resources Inc. It appears that the Cross-Complaint is making
11 claims against McKesson based on that contract though the contract with D&K—an entity that still
12 exists as a separate corporate entity. FRCP 19(a) provides in pertinent part:

13 **(a) Persons Required to Be Joined if Feasible.** A person who is subject to service of
14 process and whose joinder will not deprive the court of jurisdiction over the subject
matter of the action shall be joined as a party in the action if:

15 (1) in that person's absence complete relief cannot be accorded among those already
parties; or

16 (2) the person claims an interest relating to the subject of the action and is so
17 situated that the disposition of the action in the person's absence may:

18 (i) as a practical matter impair or impede the person's ability to protect that
interest or

19 (ii) leave any of the persons already parties subject to a substantial risk of
20 incurring double, multiple, or otherwise inconsistent obligations by reason of the
claimed interest.

21 The Court cannot accord complete relief to McKesson and Familymeds Group if D&K is not a
22 participant to this action inasmuch as Familymeds Group cannot get relief with respect to the First
23 Agreement against McKesson; remedies under the First Agreement, assuming it has been breached,
24

25 ¹ FRCP 7(a) provides:

26 There shall be a complaint and an answer; a reply to a counterclaim denominated as such; and answer to a cross-
27 claim, if the answer contains a cross-claim; a **third party complaint, if a person who was not an original party**
is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No
other pleading shall be allowed, except that the court may order a reply to an answer of a third-party answer.

28 (Emphasis added.)

1 will lie only against D&K.

2 Clearly, it is incumbent upon Familymeds Group to name D&K as a third party defendant
3 in this action if it (or Familymeds, Inc. in a properly plead action) seeks to enforce any claims
4 based on the First Agreement. "Generally, in breach of contract actions, all parties to the contract
5 are necessary ones." *Rojas v. Loewen Group Int'l*, 178 F.R.D. 356, 361 (D.C. Puerto Rico 1998).
6 Allegations that McKesson is somehow the alter ego of D&K do not cure this defect. *See, id.* at
7 363-64. Thus because Familymeds Group has failed to join D&K which is a necessary party
8 pursuant to FRCP 19, the Cross-Complaint should be dismissed pursuant to FRCP 12(b)(7). This
9 should not be problematic in this action because joinder of D&K will not destroy diversity and it is
10 feasible to join D&K.

11 **C. The Third Claim for Relief in the Cross-Complaint Should be Dismissed or**
12 **Stricken Pursuant to FRCP 12(b)(6).**

13 Alternatively, if the entire Cross-Complaint is not dismissed, the Third Claim for Relief
14 should be dismissed or stricken. It appears to allege a claim by Familymeds, Inc. against
15 McKesson based on the First Agreement. However, McKesson is not a party to the First
16 Agreement and therefore no relief may be had by Familymeds, Inc. against McKesson based on
17 that agreement. The Third Claim for Relief should be dismissed or stricken.

18 **IV. CONCLUSION.**

19 The Cross-Complaint contains fatal defects. It should be dismissed in its entirety. At a
20 minimum, all request for relief contained in the Third Claim for Relief should be dismissed or
21 stricken.

22 DATED: January 14, 2008.

HENDERSON & CAVERLY LLP

23
24 By: 

25 Maria K. Puri
26 Attorneys for McKesson Corporation
27
28

PROOF OF SERVICE

I am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is Henderson & Caverly LLP, P.O. Box 9144, 16236 San Dieguito Road, Suite 4-13, Rancho Santa Fe, California 92067.

On January 14, 2008, I served the foregoing:

**NOTICE OF MOTION, MOTION AND MEMORANDUM OF POINTS AND
AUTHORITIES OF McKESSON CORPORATION SEEKING TO DISMISS:**

**(1) COUNTERCLAIM FOR SPECIFIC PERFORMANCE OF CONTRACT AND
ACCOUNTING; AND**

(2) CROSS-COMPLAINT FOR ACCOUNTING

on the following parties in this action in the manner set forth below:

Robert C. Gebhardt, Esq.
Jeffer, Mangels, Butler & Marmaro LLP
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111-3824

☐ (BY MAIL) I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at Henderson & Caverly LLP, Rancho Santa Fe, California, following ordinary business practices. I am familiar with the practice of Henderson & Caverly LLP for collection and processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal service the same day as it is placed for collection.

☒ (BY EMAIL) I electronically filed such document using the ("CM/ECF") system which will send a Notice Of Electronic Filing to CM/ECF participants.

☐ (BY FACSIMILE) I transmitted the above-listed document to the party listed above via facsimile. The transmission was reported complete and without error. The telephone number of the facsimile machine I used was (858) 756-4732.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed at Rancho Santa Fe, California on January 14, 2008.


Quynh N. Nguyen

EXHIBIT 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

McKesson Corp., a Delaware Corp., No. C-07-5715 WDB

Plaintiff,

v.

**ORDER RE MAY 5, 2008, CASE
MANAGEMENT CONFERENCE**

Familymeds Group, Inc., f/k/a
Drugmax, Inc., a Connecticut
corporation,

Defendants.

Familymeds Group, Inc., f/k/a
Drugmax, Inc., a Connecticut
corporation,

Counterclaimant

v.

McKesson Corp., a Delaware
corporation,

Counterdefendant.

On May 5, 2008, the Court conducted a case management conference.

For the reasons stated on the record, the Court ORDERS as follows.

1. The Court RULES that informal production of additional materials by McKesson to Familymeds may not serve as the basis for an argument by Familymeds that McKesson has waived rights or objections.

1 2. For the reasons explained on the record, the Court DENIES
2 WITHOUT PREJUDICE McKesson's Motion to Dismiss, filed January 14, 2008.

3 3. The Court LIFTS the stay of discovery and further motions practice
4 entered in its March 13, 2008 Order.

5 Familymeds Group may, using an appropriate procedural device, seek to add
6 Familymeds Inc., and/or D&K as a party in this or a separate lawsuit.

7 McKesson may file a substantive motion seeking to enforce its breach of
8 contract claim. **By Wednesday, June 4, 2008**, McKesson must file with the Court
9 its substantive motion or inform the Court that McKesson does not intend to file a
10 substantive motion. If McKesson notifies the Court that it does not intend to file a
11 substantive motion the Court promptly will convene a follow up case management
12 conference to discuss scheduling.

13 IT IS SO ORDERED.

14 Dated: May 5, 2008

15 
16 _____
WAYNE D. BRAZIL
United States Magistrate Judge

17 Copies to: parties, wdb, stats
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT 5

ORIGINAL
FILED

JUN 8 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

E-filing

BZ

JEFFER, MANGELS, BUTLER & MARMARO LLP
ROBERT C. GEBHARDT (Bar No. 48965), rcg@jmbm.com
MICHAEL A. GOLD (Bar No. 90667), mag@jmbm.com
MATTHEW S. KENEFICK (Bar No. 227298), msk@jmbm.com
Two Embarcadero Center, Fifth Floor
San Francisco, California 94111-3824
Telephone: (415) 398-8080
Facsimile: (415) 398-5584

Attorneys for Plaintiffs FAMILYMEDS, INC., a Connecticut corporation and FAMILYMEDS GROUP, INC. a Nevada corporation, f/k/a DRUGMAX, INC., a Nevada corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FAMILYMEDS, INC., a Connecticut corporation; and FAMILYMEDS GROUP, INC. a Nevada corporation, f/k/a DRUGMAX, INC., a Nevada corporation,

Plaintiffs,

v.

MCKESSON CORPORATION, a Delaware corporation; and D&K HEALTHCARE RESOURCES LLC, a Delaware limited liability company, f/k/a D&K HEALTHCARE RESOURCES, INC., a Delaware corporation,

Defendants.

CASE NO. 08
CV 2850
COMPLAINT FOR:

- 1) SPECIFIC PERFORMANCE OF CONTRACT (Two Counts); and
- 2) ACCOUNTING (Four Counts).

DEMAND FOR JURY TRIAL

Plaintiffs Familymeds, Inc., a Connecticut corporation ("Familymeds, Inc.") and Familymeds Group, Inc. a Nevada corporation, f/k/a DrugMax, Inc., a Nevada corporation ("Familymeds Group") (collectively, "Plaintiffs") hereby complain against McKesson Corporation, a Delaware corporation ("McKesson") and D&K Healthcare Resources LLC, a Delaware limited liability company, f/k/a D&K Healthcare Resources, Inc., a Delaware corporation ("D&K") (collectively, "Defendants") as follows:

///

///

///

JMBM
Jeffer Mangels
Butler & Marmaro LLP

I.

GENERAL ALLEGATIONSJURISDICTION

1. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332 because this is a civil action between citizens of different states and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

Plaintiffs

2. Familymeds, Inc. is a Connecticut corporation with its principal place of business at 2 Bridgewater Road, Farmington, Connecticut 06032.

3. Familymeds Group is a Nevada corporation with its principal place of business at 2 Bridgewater Road, Farmington, Connecticut 06032.

4. On or about November 12, 2004, Familymeds Group, Inc., a Connecticut corporation merged with and into DrugMax, Inc., a Nevada corporation ("**DrugMax**"), leaving DrugMax as the surviving corporation, and thereafter, on or about July 10, 2006, DrugMax amended its articles of incorporation to change its name to Familymeds Group, Inc., a Nevada corporation.

5. Familymeds, Inc. is the wholly-owned subsidiary of Familymeds Group.

Defendants

6. Plaintiffs are informed and believe, and on that basis allege, that at all times herein mentioned, McKesson is and was a Delaware corporation with its principal place of business at One Post Street, San Francisco, California 94104.

7. Plaintiffs are informed and believe, and on that basis allege, that on or about August 30, 2005, McKesson's wholly owned subsidiary, Spirit Acquisition Corporation, a Delaware corporation, merged with and into D&K Healthcare Resources, Inc., leaving D&K Healthcare Resources, Inc. as the surviving corporation and thereby rendering D&K Healthcare Resources, Inc. a wholly-owned subsidiary of McKesson.

8. Plaintiffs are informed and believe, and on that basis allege, that from the date of its formation of December 16, 1987, until December 31, 2005, D&K was a corporation formed under the laws of Delaware.

JMBM | Jeffer Mangels
Butler & Marmaro LLP

9. Plaintiffs are informed and believe, and on that basis allege, that on or about January 1, 2006, D&K converted from being a Delaware corporation into a Delaware limited liability company, and has thereafter remained as a Delaware limited liability company with McKesson as its sole member.

10. Plaintiffs are informed and believe, and on that basis allege, that at all times herein mentioned, D&K's principal place of business is and was at 8235 Forsyth Blvd., St. Louis, Missouri 63105.

11. Plaintiffs are informed and believe, and on that basis allege, that McKesson and D&K share, and are controlled by, an interlocking directorate.

Amount in Controversy

12. The amount in controversy of each of the claims of Familymeds, Inc. and Familymeds Group against McKesson and D&K each respectively exceed the sum or value of \$75,000.

VENUE

13. All actions complained of herein took place within the jurisdiction of the United States District Court, Northern District of California. Accordingly, venue is invoked pursuant to 28 U.S.C. § 1391(a).

INTRADISTRICT ASSIGNMENT

14. A substantial part of the events, acts or omissions giving rise to the claims for relief set forth herein occurred in the City and County of San Francisco.

II.

FACTUAL BACKGROUND

The First Agreement

15. On or about December 28, 2004, Familymeds, Inc., Valley Drug Company South, a Louisiana corporation ("**Valley Drug**") and D&K entered into that certain written Prime Warehouse Supplier Agreement (the "**First Agreement**") for fair and valuable consideration, which provided, *inter alia*, for D&K to sell and Familymeds, Inc. and Valley Drug to buy certain "Products" (as that term is defined therein).

1 16. The First Agreement provided for a term of two (2) years, commencing on
2 December 28, 2004.

3 **The First Amendment**

4 17. On or about December 27, 2005, DrugMax (which amended its articles of
5 incorporation on July 10, 2006, to change its name to Familymeds Group, Inc., a Nevada
6 corporation and is referred to herein as "Familymeds Group"), Familymeds, Inc., and D&K entered
7 in that certain written First Amendment to Prime Warehouse Supplier Agreement for fair and
8 valuable consideration, which provided, *inter alia*, to amend certain terms of the First Agreement
9 (the First Agreement, as amended, shall be referred to herein as the "**First Amendment**").

10 18. The First Amendment was negotiated and drafted by McKesson's San Francisco
11 corporate office and legal department.

12 19. Plaintiffs are informed and believe, and on that basis allege, that the First
13 Amendment was executed by Paul C. Julian, who was also a director and/or officer of McKesson at
14 the time of execution of the First Amendment.

15 20. The First Amendment provided, *inter alia*, that Familymeds, Inc. and Familymeds
16 Group were obligated to "fully participate in the McKesson OneStop Generics Program through its
17 auto-substitution feature and to thereby designate this program as Customer's primary source of
18 generic pharmaceuticals..." (the "**McKesson OneStop Generics Program**").

19 21. Both Familymeds, Inc. and Familymeds Group fully participated in the McKesson
20 OneStop Generics Program, as required under the First Amendment.

21 22. The First Amendment provided, *inter alia*, that all notices thereunder shall be served
22 on McKesson Corporation, One Post Street, San Francisco, California 94104.

23 23. The First Amendment in Paragraph 10 (amending Section 8 of the First Agreement),
24 provided that Familymeds, Inc. and Familymeds Group were entitled to audit documentation
25 pertaining to Specially Priced Products (as that term is defined therein) (the "**Accounting**
26 **Obligation**");

27 ...Customer [Familymeds, Inc. and Familymeds Group] may audit
28 Customer's purchase history and pricing of Specially Priced Products
 charged to Customer by D&K as reasonably requested. D&K agrees

JMBM
Jeffer Mangels
Butler & Marmaro LLP

1 to provide Customer with the above-referenced purchase history upon
2 Customer's written request.

3 24. Beginning in or around February 2006, and until the end of the term of the First
4 Amendment in December 2006, McKesson sent to Familymeds, Inc. and Familymeds Group all
5 invoices for payment which arose under the First Amendment.

6 25. Beginning in or around February 2006, and until the end of the term of the First
7 Amendment in December 2006, Familymeds, Inc. and Familymeds Group, by direction, request,
8 and demand of D&K, sent all payments arising under the First Amendment to McKesson.

9 **The Request**

10 26. In a letter dated September 18, 2007, and addressed to Ana Schrank, Vice President
11 of Financial Services, McKesson Corporation, One Post Street, San Francisco, CA 94104, James E.
12 Searson, an officer and director of both Familymeds, Inc. and Familymeds Group, requested
13 documentation pertaining to prior account statements, Specially Priced Products (as that term is
14 defined in the First Amendment), charges, credits, pricing adjustments, and payments (the
15 "Documentation") (the "Request").

16 27. The Documentation sought in the Request is within the exclusive possession and
17 control of D&K and/or McKesson.

18 28. The Request was wrongfully refused and wholly denied.

19 29. Familymeds is informed and believes, and based thereon alleges, that Familymeds,
20 Inc. and Familymeds Group have been wrongfully overcharged certain amounts under the First
21 Amendment and credits due under the First Amendment were improperly withheld; however, the
22 Documentation necessary to determine the amount of these improper overcharges and improperly
23 withheld credits is within D&K's and/or McKesson's exclusive possession and control and the
24 September 18, 2007 Request for such information was wrongfully denied.

25 ///

26 ///

27 ///

28 ///

JMBM Jeffer Mangels Butler & Marmaro LLP

III.

FIRST CLAIM FOR RELIEF

(Specific Performance of Contract)

Count One - Familymeds, Inc. against D&K

30. Familymeds, Inc. incorporates by reference the allegations contained in Paragraphs 1 through 29 above.

31. The Accounting Obligation under the First Amendment created an express obligation for D&K to provide the Documentation to Familymeds, Inc.

32. The terms of the First Amendment, including the Accounting Obligation, are sufficiently precise, certain, and definite for enforcement by this Court.

33. The terms of the First Amendment, including the Accounting Obligation, are fair, just, and reasonable under all of the circumstances, and adequate consideration was provided by and to all parties.

34. The terms of the First Amendment, including the Accounting Obligation, are mutually available and can be enforced by and against any party to the First Amendment.

35. Familymeds, Inc. has duly performed all conditions precedent on its part required to be performed under the terms of the First Amendment, except as to those conditions for which performance was excused by D&K's material breaches.

36. D&K has breached the First Amendment by wrongfully refusing the Request, thereby breaching its Accounting Obligation.

37. Familymeds, Inc. requests that this Court order D&K to specifically perform in accordance with the terms of the First Amendment by providing the Documentation as required by the Accounting Obligation.

38. No adequate remedy at law is available to Familymeds, Inc.

WHEREFORE, Familymeds, Inc. prays for judgment as set forth herein.

Count Two - Familymeds Group against D&K

39. Familymeds Group incorporates by reference the allegations contained in Paragraphs 1 through 29 above.

JMBM
Jeffer Mangels
Butler & Marmaro LLP

1 unissued and improperly withheld credits and overcharges which cannot be ascertained without an
2 accounting, the means of which are in the exclusive knowledge and control of D&K.

3 51. D&K has the obligation and the ability to account to Familymeds, Inc.

4 52. No adequate remedy is available to Familymeds, Inc. at law and thus an accounting
5 is necessary to preserve Familymeds, Inc.'s rights.

6 WHEREFORE, Familymeds, Inc. prays for judgment as set forth herein.

7 **Count Two - Familymeds, Inc. against McKesson**

8 53. Familymeds, Inc. incorporates by reference the allegations contained in Paragraphs 1
9 through 29 above.

10 54. A relationship exists between Familymeds, Inc. and McKesson, and circumstances
11 require, that McKesson provide to Familymeds, Inc. an accounting in equity.

12 55. An unknown balance is due under the First Amendment to Familymeds, Inc. for
13 unissued and improperly withheld credits and overcharges which cannot be ascertained without an
14 accounting, the means of which are in the exclusive knowledge and control of McKesson.

15 56. McKesson has the obligation and the ability to account to Familymeds, Inc.

16 57. No adequate remedy is available to Familymeds, Inc. at law and thus an accounting
17 is necessary to preserve Familymeds, Inc.'s rights.

18 WHEREFORE, Familymeds, Inc. prays for judgment as set forth herein.

19 **Count Three - Familymeds Group against D&K**

20 58. Familymeds Group incorporates by reference the allegations contained in Paragraphs
21 1 through 29 above.

22 59. A relationship exists between Familymeds Group and D&K, and circumstances
23 require, that D&K provide to Familymeds Group an accounting in equity.

24 60. An unknown balance is due under the First Amendment to Familymeds Group for
25 unissued and improperly withheld credits and overcharges which cannot be ascertained without an
26 accounting, the means of which are in the exclusive knowledge and control of D&K.

27 61. D&K has the obligation and the ability to account to Familymeds Group.

28 62. No adequate remedy is available to Familymeds Group at law and thus an accounting

JMBM
Jeffer Mangels
Butler & Marmaro LLP

JMBM
 Jeffer Mangels
 Butler & Marmaro LLP

is necessary to preserve Familymeds Group's rights.

WHEREFORE, Familymeds Group prays for judgment as set forth herein.

Count Four - Familymeds Group against McKesson

63. Familymeds Group incorporates by reference the allegations contained in Paragraphs 1 through 29 above.

64. A relationship exists between Familymeds Group and McKesson, and circumstances require, that McKesson provide to Familymeds Group an accounting in equity.

65. An unknown balance is due under the First Amendment to Familymeds Group for unissued and improperly withheld credits and overcharges which cannot be ascertained without an accounting, the means of which are in the exclusive knowledge and control of McKesson.

66. McKesson has the obligation and the ability to account to Familymeds Group.

67. No adequate remedy is available to Familymeds Group at law and thus an accounting is necessary to preserve Familymeds Group's rights.

WHEREFORE, Familymeds Group prays for judgment as set forth herein.

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against D&K and McKesson as follows:

On The First Claim For Relief For Specific Performance Of Contract:

Count One - Familymeds, Inc. against D&K

1. For specific enforcement of the First Amendment compelling D&K to comply with its Accounting Obligation;

2. For costs of suit herein incurred; and

3. For such other and further relief as the Court may deem proper.

Count Two - Familymeds Group against D&K

1. For specific enforcement of the First Amendment compelling D&K to comply with its Accounting Obligation;

2. For costs of suit herein incurred; and

3. For such other and further relief as the Court may deem proper.

On the Second Claim For Relief Accounting In Equity:

Count One - Familymeds, Inc. against D&K

1. For an order compelling D&K to provide to Familymeds, Inc. an accounting in equity;
2. For costs of suit herein incurred; and
3. For such other and further relief as the Court may deem proper.

Count Two - Familymeds, Inc. against McKesson

1. For an order compelling McKesson to provide to Familymeds, Inc. an accounting in equity;
2. For costs of suit herein incurred; and
3. For such other and further relief as the Court may deem proper.

Count Three - Familymeds Group against D&K

1. For an order compelling D&K to provide to Familymeds Group an accounting in equity;
2. For costs of suit herein incurred; and
3. For such other and further relief as the Court may deem proper.

Count Four - Familymeds Group against McKesson

1. For an order compelling McKesson to provide to Familymeds Group an accounting in equity;
2. For costs of suit herein incurred; and
3. For such other and further relief as the Court may deem proper.

///

///

///

///

///

///

JMBM
Jeffrey Mangels
Butler & Marmarou LLP

1 DATED: June 6, 2008

JEFFER, MANGELS, BUTLER & MARMARO LLP
ROBERT C. GEBHARDT
MICHAEL A. GOLD
MATTHEW S. KENEFICK

4 By: 

MATTHEW S. KENEFICK

Attorneys for Plaintiffs FAMILYMEDS, INC., a
Connecticut corporation and FAMILYMEDS GROUP,
INC., a Nevada corporation, f/k/a DRUGMAX, INC., a
Nevada corporation

9 JURY DEMAND

10 Plaintiffs demand a jury trial on all issues so triable.

11 DATED: June 6, 2008

JEFFER, MANGELS, BUTLER & MARMARO LLP
ROBERT C. GEBHARDT
MICHAEL A. GOLD
MATTHEW S. KENEFICK

14 By: 

MATTHEW S. KENEFICK

Attorneys for Plaintiffs FAMILYMEDS, INC., a
Connecticut corporation and FAMILYMEDS GROUP,
INC., a Nevada corporation, f/k/a DRUGMAX, INC., a
Nevada corporation

JMBM
Jeffer Mangels
Butler & Marmaro LLP